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6 DISTRICT COURT OF GUAM

7 TERRITORY OF GUAM

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9 NANYA TECHNOLOGY CORP. and  
NANYA TECHNOLOGY CORP. U.S.A.,

Civil Case No. 06-00025

10 Plaintiffs,

ORDER

11 vs.

12 FUJITSU LIMITED and FUJITSU  
13 MICROELECTRONICS AMERICA, INC.,

14 Defendants.

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16 On April 25, 2006, this case came before the Court for hearing on the Plaintiffs'  
17 (collectively referred to as "Nanya") Motion to Compel Documents Responsive to Plaintiffs'  
18 Jurisdictional Requests for Production ("Motion to Compel"). (Docket No. 185.) After listening  
19 to the parties' respective arguments and reviewing the pleadings, the case file and relevant  
20 authority, the Court issues the following Order.

21 **FACTUAL BACKGROUND**

22 This action involves disputes surrounding certain patents.

23 On December 5, 2006, defendant Fujitsu Microelectronics America, Inc. ("FMA") filed a  
24 Motion to Dismiss, Motion for More Definite Statement, and Motion to Transfer to the Northern  
25 District of California.<sup>1</sup> (Docket No. 74.) This dispositive motion is pending before Judge

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<sup>1</sup> In its motion, FMA argued that it was not properly before this Court and that the Court  
28 should either dismiss the case or transfer it to the Northern District of California.

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1 Tydingco-Gatewood and is scheduled for hearing on June 22, 2007. Pursuant to the parties' 2 Stipulation (Docket No. 148), which was subsequently approved by the Court (see Order, Docket 3 No. 163), Nanya's opposition to FMA's motion is due by May 15, 2007. (*Id.* at ¶3.) 4 Additionally, Nanya is permitted to file a sur-reply on or before June 7, 2007. (Id.)

5 On January 17, 2007, Nanya filed a Motion to Clarify Magistrate Judge’s Order and  
6 Motion to Compel Substantive Responses to Plaintiffs’ Discovery Requests.<sup>2</sup> (Docket No. 113.)  
7 Thereafter, on February 9, 2007, Nanya filed a similar pleading captioned Motion to Compel  
8 Substantive Responses to Plaintiffs’ First Requests for Production. (Docket No. 132.) In these  
9 motions, Nanya claimed it sought “jurisdictional discovery” as opposed to “merits discovery.”  
10 On February 28, 2007, the parties filed a Stipulation wherein the Defendants agreed to produce  
11 documents responsive to the jurisdictional discovery requests.<sup>3</sup> (Docket No. 148 at ¶3.) Based  
12 on this Stipulation, the Court determined that Nanya’s two pending motions to compel  
13 jurisdictional discovery were moot. (Order, Docket No. 172.)

14 On April 16, 2007, Nanya filed the instant Motion to Compel, along with an *Ex parte*  
15 Motion to Shorten Time to Hear Motion to Compel. (Docket No. 186.) In light of Nanya's  
16 looming deadline to file an opposition to FMA's pending motion, the Court found good cause to  
17 grant the Motion to Shorten Time.<sup>4</sup> (Docket No. 190.) Thereafter, FMA filed its Opposition  
18 (Docket No. 196) on April 20, 2007, and Nanya filed a Reply Brief (Docket No. 202) on April

20                   <sup>2</sup> On December 14, 2007, the Plaintiffs served FMA with its First Request for Production  
21 of Documents (“First Request”). See Exhibit A to Docket No. 185. This First Request consisted  
of 147 separate requests and focused on “FMA dynamic memory chips.”

22 After a meet and confer held on February 6, 2007 (after Nanya had filed its first motion to  
23 compel, Docket No. 113), Nanya served FMA on February 9, 2007, with a Second Set of  
24 Jurisdictional Requests for Production. See Exhibit A-2 to Docket No. 185. This Second Set  
25 comprised of 67 requests for production of documents regarding “accused devices,” which was  
defined as referring specific part numbers or devices. *Id.* at ¶12. The parties held a meet and confer  
on the Second Set on March 21, 2007.

<sup>3</sup> FMA would produce its responsive documents by April 2, 2007, while Fujitsu Limited would produce its responsive documents by April 16, 2007.

<sup>4</sup> On the same date the Court granted the Motion to Shorten Time but after the issuance of said Order, the Defendants filed an Opposition to the Motion to Shorten Time. (Docket No. 191.)

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1 23, 2007.

2 ANALYSIS

3 Nanya contends that FMA has not honored its agreement to provide documents  
4 responsive to Nanya's two sets of jurisdictional requests for production. Nanya asserts that  
5 FMA either provided documents that fail to cover the identified parts or provided "only a small  
6 number of documents that only tangentially and selectively address [Nanya's] requests." Mot.,  
7 Docket No. 185, at 3.

8 FMA first objects to Nanya's Motion to Compel on procedural grounds. FMA asserts  
9 that once again Nanya has failed to comply with the Court's Local Rules of Practice before it  
10 filed a discovery motion.<sup>5</sup> In this instance, FMA argues that Nanya failed to comply with Rule  
11 LR37.1, which provides as follows:

12 (a) **Prior to filing of any motion relating to a discovery dispute, counsel  
for the parties shall meet in person in a good faith effort to eliminate the  
necessity for hearing the motion or to eliminate as many of the disputes as  
possible. It shall be the responsibility of counsel for the moving party to  
arrange for the conference.**

13 (b) **If counsel are unable to settle their difference, they shall formulate a  
written stipulation specifying separately and with particularity each issue  
that remains to be determined at the hearing and the contentions and points  
and authorities of each party.** The stipulation shall not refer the Court to other  
14 documents in the file.

15 By way of example only, if the sufficiency of an answer to an  
16 interrogatory is in issue, the stipulation shall contain verbatim, both the  
17 interrogatory and the allegedly insufficient answer, followed by each party's  
18 contentions, separately stated. The stipulation shall be served and filed with the  
19 notice of motion. **In the absence of such stipulation, or a declaration of  
counsel of non-cooperation by the opposing party, the Court will not  
consider any discovery motion unless otherwise ordered upon good cause  
shown.**

20 . . .  
21 (d) If the discovery disputes are found to be frivolous or based on counsel's  
22 failure to cooperate with each other in good faith, sanctions will be imposed at the  
23 discretion of the Court.

24 (Emphasis added.)

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26 <sup>5</sup> In opposing Nanya's prior motions to compel jurisdictional discovery (Docket Nos. 113  
27 and 132) and Nanya's Motion to Exceed Number of Interrogatories and Requests for Admissions  
28 (Docket No. 126), the Defendants urged the Court to deny said motions outright based on Nanya's  
failure to comply with the Local Rules.

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1       At the last hearing held on March 2, 2007, the Court specifically stated that while it  
2 would excuse Nanya's failure to comply with Local Rule LR33.1 (which requires the party  
3 wishing to serve additional interrogatories to submit them in a writing to the Court along with  
4 reasons establishing good cause for their use), in the future all parties must ensure full  
5 compliance with the Local Rules.<sup>6</sup> In this case, Nanya has once again failed to comply with the  
6 Local Rules. Nanya failed to cooperate with FMA in a good faith effort to prepare "a written  
7 stipulation *specifying separately and with particularity* each issue that remains to be determined  
8 at the hearing and the contentions and points and authorities of each party." Local Rule  
9 LR37.1(b). Such a stipulation would have narrowed and focused the issues so as to permit the  
10 Court to resolve this discovery dispute quickly.

11       At the hearing, Nanya's counsel asserted that Local Rule LR37.1 is inapplicable here  
12 since said rule is limited to general discovery disputes and excludes matters of urgency. The  
13 Court disagrees. Local Rule LR37.1 does not contain the limiting language that Nanya's counsel  
14 asserts should be read into it. Nanya further argues in its Reply Brief that a stipulation is not  
15 necessary because this discovery dispute is not over the "sufficiency of a response" but rather the  
16 lack of a response at all. This argument also has no merit since the requirement for a stipulation  
17 under Local Rule LR37.1(b) is not limited to those instances where the discovery dispute is over  
18 the sufficiency of a party's response. Nanya once again misinterprets the intent of Local Rule  
19 LR37.1.

20       Additionally, Nanya states that it is wary of entering into another stipulation with FMA

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23       <sup>6</sup> The Court stated:

24           I am disappointed with the plaintiffs in that they did not file the  
25 interrogatories as the rule requires, but I think I know the reason why; they don't  
26 know what to ask at this point. So that explains why these interrogatories are not  
27 before the court.

28           Of course I'm a stickler for purposes of complying with the rules; rules must  
29 be complied with in order to get your request.

30       Tr. at 69-70 (Docket No. 174).

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1 since FMA has a "history of using the promise of a stipulation in bad faith."<sup>7</sup> The alleged failure  
2 of the parties to reach a stipulation in one instance does not eliminate the requirement to reach a  
3 stipulation in good faith in this instance and in all subsequent instances. If anyone is not  
4 proceeding in good faith on this matter it might be Nanya since it filed the present Motion to  
5 Compel without the required stipulation. Nanya can not use FMA's alleged history of bad faith  
6 negotiations over stipulations as an excuse for its own failure since the FMA's alleged bad faith  
7 occurred after Nanya had already filed the instant motion.

8 In lieu of a stipulation, Local Rule LR37.1(b) requires that the movant must file a  
9 declaration of non-cooperation by opposing counsel. Nanya failed to file such a declaration  
10 when it filed its Motion to Compel. Neither Mr. Razzano's declaration (Docket No. 189) nor  
11 Mr. Freeman's declaration (Exhibit A to Docket No. 202) indicate that FMA's counsel was not  
12 cooperating in the formulation of a written stipulation as required by Local Rule LR37.1(b). In  
13 fact, Nanya could not file such a declaration because the e-mails attached to its own Reply Brief  
14 indicate that FMA was cooperating in trying to resolve this dispute. See Exhibit 4 to Reply  
15 Brief.

16 Finally, Nanya contends that the impending deadlines constitute good cause to excuse its  
17 failure to file either a stipulation or a declaration of non-cooperation. Nanya claims that it  
18 attempted to reach a resolution to this issue for six days before it filed the motion, but with the  
19 deadline approaching on May 15, 2007, it had no choice but to file its motion. While the Court  
20 found "good cause" to expedite the briefing period on the Motion to Compel, this does not  
21 equate to a showing of "good cause" to completely ignore the mandates of Local Rule LR  
22 37.1(b). In reviewing the various letters and e-mails exchanged between the parties which were  
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24 <sup>7</sup> Nanya alleges that FMA contacted Nanya regarding the filing of a motion to immediately  
25 transfer this action to the Northern District of California on the basis of forum non-convenience.  
26 FMA wanted an expedited hearing on said motion, but Nanya refused unless the parties could  
27 engage in limited discovery on the convenience issues. FMA agreed to so stipulate, and Nanya then  
28 began working on a written stipulation to the effect. After drafting a 19-page stipulation and  
thereafter revising it based on subsequent negotiations, Nanya contends that the Defendants did not  
sign the stipulation and instead filed their motion for immediate transfer on April 17, 2007. See  
Docket No. 192.

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1 appended to the relevant pleadings associated with this Motion to Compel, the Court did not find  
2 a single instance where Nanya's counsel ever discussed the option of drafting a stipulation as  
3 required by LR37.1(b). Had such a stipulation been presented to the Court, then the Court would  
4 not have had to order further briefing on the Motion to Compel because the contentions and  
5 points and authorities of each party would have been readily available for consideration. Instead,  
6 the Court and opposing counsel spent unnecessary time and expense in preparing for the hearing.  
7 Such disregard for the Court's Local Rules after an earlier admonition from the Court is  
8 unacceptable. Accordingly, the Court hereby DENIES the Motion to Compel. The Court will  
9 not impose sanctions against Nanya in this instance, but the Court cautions all counsel that it will  
10 not hesitate to impose sanctions in the future, if warranted, when the Local Rules are not  
11 followed.

12 While the Court denies the relief sought by Nanya, the Court will hold FMA's counsel  
13 Michael Murray at his word, as an officer of this Court, when he stated that FMA would conduct  
14 a reasonable search for the documents that are responsive to Martin Pascual's letter dated  
15 April 13, 2007, and provide Nanya with said documents within the following two weeks. While  
16 Nanya may not be able to review these documents as thoroughly as it wishes prior to filing its  
17 opposition brief on May 15, the Court believes that Nanya will still have the ability to use and  
18 incorporate the relevant documents into its sur-reply, which will not be due until June 7, 2007.

19 As a matter of providing guidance to the parties for future discovery disputes, the Court  
20 advises the parties that a proper Rule LR37.1(b) stipulation shall be appended to any discovery  
21 motion. If such a stipulation is filed, further briefing would likely be unnecessary, and the Court  
22 could set a hearing on the discovery dispute as early as possible, or could quickly issue a ruling  
23 based on what is presented in the stipulation. If a stipulation can not be formulated, then the  
24 discovery motion shall include the necessary declaration attesting to the non-cooperation of  
25 opposing counsel, along with documentary evidence of such non-cooperation (*e.g.*, a written  
26 stipulation prepared by the movant accompanied by e-mails or letter that show opposing counsel  
27 has received the stipulation but refuses to sign it, written correspondence to set up a meet and  
28 confer to formulate a stipulation with no response or unreasonable delays from opposing

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1 counsel, etc.). The failure to include either a stipulation or declaration as required by Local Rule  
2 LR37.1(b) when filing a discovery motion will almost certainly result in the outright denial of  
3 the request and the imposition of stiff sanctions as warranted.

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/s/ **Joaquin V.E. Manibusan, Jr.**  
**U.S. Magistrate Judge**  
**Dated: Apr 26, 2007**